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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT

L.C., a minor, by and	)	CASE NO.CV 18-01535
through his Guardian Ad	)	SVW (SHKx)
Lite, AUSENCIA CRUZ,)	
Plaintiffs,	)	PLAINTIFF'S OPPOSITION
v.	)	TO DEFENDANT'S MOTION TO
ALTA LOMA SCHOOL DISTRICT,	)	COMPEL COMPLIANCE WITH
A Local Educational Agency,	)	COURT'S PRIOR ORDER AND
Defendant.	)	TO REQUEST FOR
	)	REIMBURSEMENT OF
	)	ATTORNEY'S FEES AND
	)	COSTS AND FOR MONETARY
	)	SANCTIONS

DATE: 4-18-22
 TIME: 1:30 p.m.
 CTRM: 10A

Plaintiff presents his Opposition to Defendant's
 Motion to Compel Compliance with Court's Prior Order
 and to Defendant's Request for Monetary Sanctions as
 follows:

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INTRODUCTION

Defendant has filed a motion without compliance with Local Rules for a "meet-and-confer" conference. In its motion, Defendant slings mud, stating that Plaintiff has filed "unmeritorious petitions for rehearing" but failing to provide support for that claim. Defendant alleges that Plaintiff has engaged in tactics and taken "positions that confuse the issues and stall and delay proceedings" but does not document them. For example, in Plaintiff's motion for fees in the District Court, Counsel was criticized for the increase in her fees over the course of settlement negotiations with Defendant District. From early February 2018 until the date of the due process hearing, on May 2, 2018, as the parties discussed settlement terms, Plaintiff's counsel had to continue to prepare for hearing, increasing her fees often on a daily basis. Anything less would have been malpractice and would not have permitted Plaintiff to be prepared to proceed at hearing. Because the Court has been provided Plaintiff's Billing Invoices from the underlying due process matter, the Court has not yet had.. and never will have... an opportunity to gauge Counsel's services during settlement discussions.

Essentially, Defendant faults Plaintiff for the lack of re-payment to the District and then alleges "tactics" and actions that are not defined.

**PLAINTIFF'S COUNSEL DID NOT ACT IN A
DILATORY OR BAD FAITH MATTER.**

When the Ninth Circuit Court of Appeals issued its mandate, Defendant's counsel contacted Plaintiff about repayment of the \$2,784.17 paid for attorneys fees from the District. Counsel for Plaintiff had timely filed a Petition for En Banc Re-hearing and had discovered authority that indicated that a mandate was not final until, if appealed, the mandate was affirmed. *People ex rel. Gow v. Mitchell Bros' Santa Ana Theater* (1980) 101 CA 3d 296, 306, 161 CR 5620. The parties communicated regarding the repayment, and Plaintiff's counsel reminded Defendant that, upon the ruling denying the En Banc Re-hearing, timely payment would be made. (See Decl. of Santos, Exhibit 6) At that time, there was no objection or disagreement by Defendant with Counsel's statement regarding payment after the En Banc ruling.

Following the denial of an En Banc re-hearing in January 2022, Plaintiff's counsel realized that there had been no final determination on the appeal filed by Defendant District to overturn the remanded OAH Decision. Counsel discussed settling that matter by addressing the fees to the prevailing party parents and offsetting the fees due to the District by the Ninth Circuit mandate. Defendant's counsel did not object to that statement and took no steps to file a motion, i.e., to hold the Local Rule 7-3 conference

1 before any motion was filed.

2 Counsel's intent in discussion and delaying the
3 payment was to address potential settlement of the
4 still-pending-but-stayed complaint filed by Defendant
5 in CV 20-00235 SVW. Instead of further litigation by
6 the parties in that matter, Counsel believed it to be
7 appropriate to discuss an offset of fees due to the
8 District along with potential fees should District's
9 complaint in CV 20-00235 SVW be denied.

10 There was no intent by Plaintiff's counsel to
11 delay payment... other than to address the payment so
12 that further litigation might be avoided by a lack of
13 back-and-forth checks between the parties. Had
14 Defendant conducted a meet-and-confer, this would have
15 been addressed and discussed at that time. However,
16 Plaintiff could not obtain any response from Defendant
17 about an offset for potential fees in the pending
18 District Court case.

19 Plaintiff's counsel received a copy of the
20 Court's March 20, 2022 Minute Order on April 6, 2022,
21 when she returned home from a long cruise. At that
22 time, Counsel prepared a check for an advancement on
23 behalf of Plaintiff's parents to the District and sent
24 that check to Defendant's counsel.

25
26 **DEFENDANT'S COUNSEL FAILED TO COMPLY WITH
LOCAL RULE 7-3 PRIOR TO FILING OF ANY MOTION**

27 In all cases that are not exempt or addressed by
28 discovery or temporary restraining orders or

1 injunctions...

2 Counsel contemplating the filing of any motion
3 shall first contact opposing counsel to discuss
4 thoroughly, preferably in person, the substance
5 of the contemplated motion and any potential
6 resolution. The conference shall take place
7 at least seven (7) days prior to the filing
8 of the motion. If the parties are unable
9 to reach a resolution which eliminates the
10 necessity for a hearing, counsel for hte
11 moving party shall include in the notice of
12 motion a statement to the following effect

13 (This motion is made following the conference
14 of counsel which took place on ____.)

15 Local Rule 7-3

16 The Notice of Motion states that a "conference of
17 counsel" took place on June 26 and September 10, 2020;
18 July 7 and 30, 2021; and January 24, February 11 and
19 24, and March 3, 2022. (Notice 2:23-25)

20 This statement is false. The communications by
21 Defendant's counsel were emails or letters and did
22 not comply with Local Rule 7-3.

23 The June 26, 2020 email does even not purport to
24 address any potential motion. (See Dkt 92-3, p. 20)

25 Neither does the September 10, 2020 email even
26 purport to address any potential motion. (See Dkt
27 92-03, p. 22)

28 Defendant's counsel's letter of July 7, 2021
did mention a motion but failed to comply with the
requirements of LR 7-3. (See Dkt. 92-3, p. 24-25)

An email sent to Ms. Santos on July 30, 2021
from Plaintiff's counsel reminded Ms. Santos of the
En Banc Petition filed by Plaintiff. (See Dkt. 92-3,

1 p. 27)

2 Defendant did send a letter on February 24, 2022
3 to Plaintiff but, again, there was no offer to conduct
4 the conference mandated by L.R. 7-3. (See Dkt 92-3,
5 pp. 29-30) In fact, at no time did Ms. Santos express
6 any interest in the meet-and-confer conference
7 mandated by LR 7-3.

8 The email from Ms. Santos on February 11, 2022
9 did mention the filing of a motion but failed to
10 comply with LR 7-3. (See Dkt 92-3, p. 32)

11 As with all other communications to Plaintiff,
12 the February 24, 2022 letter failed to offer a meet-
13 and-confer conference in order to comply with LR 7-3.

14 The final email sent by Ms. Santos, like all the
15 remaining communications that Defendant alleges are
16 "the conference of counsel pursuant to L.R. 7-3..."
17 (Notice, 2:23-25) once again fails to offer a meet-
18 and-confer as L.R 7-3 requires.

19 Had Defendant actually met and conferred with
20 Plaintiff's counsel to discuss its potential motion,
21 the parties certainly would have discussed Plaintiff's
22 claims regarding the "stayed" District Court case
23 related to the remanded OAH Decision issued November
24 8, 2019 in which Plaintiff fully prevailed. The
25 parties would have discussed a reasonable approach for
26 the Court to address returning that matter to the
27 active calendar.

28 As intended by LR 7-3, all of this might have

1 been avoided had Defendant complied with that
2 mandatory conference.

3 **ATTORNEY'S FEES ARE THE RIGHT OF AND PAYABLE TO**
4 **A PARENT WHO PREVAILS IN A DUE PROCESS HEARING.**

5 Pursuant to the Individuals with Disabilities
6 Education ("IDEA"), the right to attorney's fees is
7 that of a parent. 20 U.S.C. § 1415(i)(3)(B)(i)

8 In general, in any action or proceeding
9 brought under this section the court in its
10 discretion may award reasonable attorney's
11 fees as part of the costs ...to a prevailing
12 party who is a parent of a child with a
13 disability.

14 ID

15 In this matter, the Court ordered payment of fees
16 to Plaintiff, not to Plaintiff's counsel, who was
17 never a party to this matter. Plaintiff's counsel,
18 who was never asked to participate in mandatory Local
19 Rule 7-3 conference, and whose client has valid and
20 viable claims for fees for a second OAH Decision that
21 has yet to be reversed, has now advanced the repayment
22 of the fees to Defendant Alta Loma School District.
23 That payment was made within a few weeks of the final
24 order from the Ninth Circuit Court of Appeals which
25 denied Plaintiff's En Banc Petition on January 14,
26 2020. The issue of payment to Plaintiff in this
27 matter, should the District's pending complaint to
28 reverse the remanded OAH Decision fail, remains to be
29 determined.

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**PLAINTIFF'S COUNSEL HAS ADVANCED THE REIMBURSEMENT
OF PLAINTIFF'S ATTORNEY'S FEES TO DEFENDANT
ALTA LOMA SCHOOL DISTRICT.**

Knowing that Plaintiff's counsel, Tania Whiteleather, would be leaving her office on March 17, 2022 for over two weeks and would be out of the country, Ms. Santos, without proposing a meet and confer, filed a Motion to Compel Enforcement and to Request Monetary Sanctions on that very day, shortly after the close of business. Here, Defendant's counsel would have done better by adhering to the Court's Civility and Professionalism Guidelines, available at the Court's website at [https://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines#Service %20of%20apers](https://www.cacd.uscourts.gov/attorneys/admissions/civility-and-professionalism-guidelines#Service%20of%20apers).

Under Section B, "Lawyer's Duties to Other Counsel," subsection B.3, "Service of papers," reads in pertinent parts:

Service of Papers

We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.

We will not serve papers sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

We will not serve papers in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

The first and third sections above are precisely

1 on point and should have been followed by Defendant.

2 Once the motion was filed, Counsel for Plaintiff
3 immediately contacted Ms. Santos about a joint
4 continuance of the motion, but after Defendant
5 declined that request, then filed her Ex Parte
6 Application, explaining that she was out of the
7 country and could not access internet or timely
8 respond to the Motion. Had Ms. Santos conducted the
9 meet-and-confer mandated by LR 7-3, Counsel for
10 Plaintiff would have been alerted to the need to
11 address her client's repayment and the options
12 regarding such repayment.

13 Defendant's failure to propose the meet-and-
14 confer conference mandated by LR 7-3 and instead
15 filing the motion when its counsel knew that
16 Plaintiff's counsel would not be in her office
17 appears - besides violating the Civility and
18 Professional Guidelines - intended to defeat the
19 purpose of 7-3, which is to attempt to resolve issues
20 before a motion is filed.

21 It would appear reasonable for the Court to
22 continue the motion so that the required meet-and-
23 confer conference pursuant to LR 7-3 can be held.

24 Plaintiff's Counsel has now, after returning from
25 an out-of-country vacation, advanced for her client
26 the payment due from Plaintiff to Alta Loma School
27 District.

28 /////

1 **OTHER ACTIONS OF PLAINTIFF'S COUNSEL WERE NOT TAKEN**
2 **IN BAD FAITH, NOR WERE THEY DILATORY NOR DID SHE**
3 **NEEDLESSLY PROTRACT THIS MATTER.**

4 In the fee motion filed by Plaintiff's counsel
5 for the initial OAH hearing, the Court did state that
6 Plaintiff's counsel had engaged in "protracting
7 behavior." However, the Court never had a chance to
8 review the actual timesheets and billing invoices from
9 Counsel for Plaintiff which identified the required
10 services that Counsel had to provide during the
11 parties negotiations in the hearing. Specifically,
12 the Court ordered that no billing for the hearing be
13 filed; Plaintiff complied, and the Court was unaware
14 of the actual times and services expended by Counsel
15 for Plaintiff in the underlying hearing.

16 Without that detailed billing, the Court had only
17 the letters back and forth regarding the parties'
18 offers and counter-offers... and nothing to identify
19 the mandatory services and required actions that were
20 the cause of increased fees for Plaintiff.

21 Defendant now contends that Plaintiff should have
22 complied with the Ninth Circuit's June 30, 2021
23 mandate and returned the fees paid to the parents.
24 Defendant fails to mention that, after this Court's
25 order for fees and costs, it took six months for
26 Defendant to provide that minimal payment to
27 Plaintiff.

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1 **ALTHOUGH DEFENDANT FILED A SEPARATE COMPLAINT**
2 **TO REVERSE THE SECOND DUE PROCESS DECISION, THAT**
3 **MATTER HAS NOT YET BEEN CONCLUDED.**

4 On February 5, 2020, Alta Loma School District
5 filed a complaint to reverse the remanded OAH
6 Decision. That matter, *Alta Loma School Dist. V. Raul*
7 *Cruz and Ausencia Cruz*, CV 20-00235, was stayed by
8 this Court on June 11, 2020 and has not been returned
9 to the Court's active calendar.

10 While Plaintiff herein understands that the
11 stayed case could result in a reversal of the OAH
12 Decision on November 8, 2019, that conclusion is not
13 foregone and is dependent upon a further ruling by
14 this Court. Defendant is well aware of that fact.
15 Even though Plaintiff's Counsel has addressed
16 settlement of the pending District Court case,
17 including fees that were incurred in that matter,
18 counsel for Defendant, has overlooked the fact that
19 Plaintiff L.C. prevailed in the remanded OAH Case and
20 received a positive Decision on November 8, 2019.

21 Following the Order by the Ninth Circuit Court of
22 Appeals reversing this Court's Judgment and Order for
23 attorney's fees, Plaintiff filed a Petition for En
24 Banc Hearing. That petition was denied in February
25 2022, and counsel for the parties communicated about
26 both the fees paid pursuant to this Court's Order and
27 the fees due to the parents for the OAH due process in
28 which they prevailed.

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**COUNSEL FOR DEFENDANT MAKES SEVERAL MIS-STATEMENTS
IN THE PLEADINGS.**

An award of attorney's fees may be awarded a prevailing defendant when a plaintiff's claim was "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) The Ninth Circuit later addressed fee awards to prevailing defendants, finding a case to be frivolous only when "...the result is obvious or the ...arguments of error are wholly without merit." *Karam v. City of Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003) (citations omitted)

In *Christianburg*, the Court warned that

...a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.

Id., at 727,

The *Christianburg* standard is a high one, rarely has a case been found so frivolous that the imposition of attorney's fees on the plaintiff are justified. A Court's more than cursory review, application of the law to the facts at length, and failure to find any arguments to be frivolous supports a finding that the plaintiff's theories were not frivolous. *Jane L. v. Bangerter*, 61 F.3d 1505, 1513 (10th Cir. 1995) In short, "so long as the plaintiffs present evidence that, if believed by the fact-finder, would entitle them to relief, the case is per se not frivolous and

1 will not support an award of attorney's fees. *E.E.O.C.*
2 *v. Bruno's Restaurant*, 13 F.3d 285, 290 (9th Cir.
3 1992), *R.P v. Prescott Unified School Dist.*, 631 F.3d
4 1117 (9th Cir. 2011) While the above cases speak to
5 complaints and causes of action, they also define
6 "frivolous."

7 Plaintiff's attempt to address the pending (but
8 stayed) case seeking to reverse the remanded OAH
9 Decision issued on November 8, 2019 was not abusive
10 or frivolous. It was a reasonable action to take
11 given the fact that L.C. and his parents had prevailed
12 in that second OAH hearing, and that, despite the
13 District's complaint to reverse that Decision, no
14 reversal has yet been granted.

15 Again, had the parties been able to discuss the
16 pending (but stayed) case and its significance related
17 to the ordered reimbursements, the issues raised
18 herein might have been resolved. However, Defendant
19 failed to request a meet-and-confer conference.

20 Defendant claims that Plaintiff has made
21 "unmeritorious petitions for rehearing" (Motion,
22 14:27). As counsel for Defendant well knows, the
23 only petition for re-hearing filed by Plaintiff was to
24 the Ninth Circuit for an En Banc re-hearing. Simply
25 because a party does not obtain an en-banc hearing,
26 the petition for en banc is neither frivolous nor
27 improper; Plaintiff did not "knowingly or recklessly
28 [raise] a frivolous argument..." (*Primus Auto. Fin.*

1 *Serv. Inc., v. Batarse*, 115 F.3d 644, 648-649 (9th
2 Cir. 1997) by seeking an En Banc re-hearing when
3 Plaintiff believed that the Ninth Circuit mis-took
4 the facts. As Plaintiff presented in the petition,
5 the significant lack of cost information regarding the
6 independent evaluator prevented the parties from
7 negotiation the costs of the evaluator, as the
8 District Court found. Plaintiff's En Banc Petition
9 set forth a simple and clear statement of the need for
10 re-hearing; the lack of an order granting the En Banc
11 did not make that petition frivolous. Further,
12 Defendants have identified nothing that made or makes
13 that En Banc petition frivolous. That the Ninth
14 Circuit Court of Appeals took six months to deny that
15 petition indicates that there was some significant
16 review of Plaintiff's request and that, far from being
17 frivolous, it apparently seemed to the Court to be a
18 fairly close question.

19 Tiffany Santos presents a letter in which she
20 claimed that represented the District in "any and all
21 matters involving L.C." (See Declaration of T. Santos
22 Exhibit 9, Doc. 92-3) In fact, Ms. Santos' email of
23 February 11, 2022 did not made such a statement.
24 (Decl. of T. Santos, Exhibit 8)

25 Plaintiff's counsel attempted to speak to the
26 District's superintendent regarding a potential claim
27 by Plaintiff for fees for the November 8, 2019 OAH
28 due process Decision in which Plaintiff prevailed.

1 In an overabundance of caution, because Defendant's
2 counsel has stated several times that she has not
3 received emails addressed to her, Plaintiff's counsel
4 communicated with both the superintendent regarding
5 that potential future case/claim for fees and with Ms.
6 Santos. The fees claim was outside of representation
7 in the current matters and could be addressed to a
8 District representative. Rules of Prof'l Conduct 4.2
9 Plaintiff's counsel violated no ethical rules by her
10 communications.

11 CLOSING

12 Defendant has failed to comply with LR 7-3, a
13 mandatory step before filing a motion such as that
14 filed herein. Without an actual conference as to the
15 positions of the parties, including the status of the
16 second District Court case, *Alta Loma School Dist. V.*
17 *Raul Cruz and Ausencia Cruz*, CV 20-00235, the parties
18 could not address the issues relevant to the pending
19 matter and to judicial economy. Plaintiff's counsel
20 shared her concerns with Defendant regarding offset
21 and the pending District Court case, but that was
22 never discussed at a meet-and-confer.

23 Petitioner and his counsel took no actions that
24 were frivolous or in bad faith. Filing the En Banc
25 petition, given the findings by the District Court,
26 was not an action that fit the description of
27 frivolous under federal law. Petitioner's counsel
28 informed Defendant of her intent to wait until the

1 appeal was final, i.e., until the Ninth Circuit Court
2 of Appeals had ruled on his En Banc Petition. Not
3 once did Defendant seek to conduct the meet-and-confer
4 to address any concerns with Plaintiff's position.

5 Plaintiff's counsel has now advanced the fee
6 reimbursement to Defendant District and asks that the
7 Court find her client's - and her - actions to not
8 have been dilatory or in bad faith in light of the
9 facts herein. Plaintiff asks that the Court deny the
10 request by Defendant for sanctions.

11 Dated: April 10, 2022

12 By: /s/ Tania L. Whiteleather
13 TANIA L. WHITELEATHER
14 Attorney for Plaintiff
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